Suaib bin Thandi v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS J-05(M)-329–09 OF 2020 AND J-05(M)-326–09 OF 2020
KAMALUDIN MD SAID, AHMAD NASFY AND HASHIM HAMZAH JJCA
29 DECEMBER 2021

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellants convicted for murder — Whether circumstantial evidence was sufficient — Whether there was appealable error — Whether conviction was safe

Evidence — Circumstantial evidence — Murder — Whether evidence irresistibly pointed to guilt of accused — Whether evidence of main witness was credible — Whether there was a break in chain of circumstantial evidence

Evidence — Admissibility — Information leading to fact discovered — Whether statements in police report leading to discovery of evidence was admissible — Whether information obtained from joint statement was admissible — Whether oral evidence of information was admissible — Evidence Act 1950 s 27

These were the appeals by the appellants against the decision of the High Court judge ('the HCJ') who convicted them for committing murder under s 302 of the Penal Code and sentenced them to death. On 29 September 2016, SP9 arrived at a park alone to meet up with a friend. At the same time, the deceased made a telephone call to SP9 to ask where the latter was and not long after, the deceased arrived at the park where SP9 was waiting for his friend. While the deceased was looking at his handphone, the first appellant, who was also known as 'Fogi' and the second appellant, known as 'Buhak' who were both clad in sarongs, approached them. SP9 identified the first appellant based on his taller frame as compared to the second appellant. All of sudden the deceased cried out 'Pak lari'. At that time SP9 saw the second appellant took out a 'parang' from his sarong although he later said he was not quite sure where the second appellant took out the parang from. SP9 said that he saw the first appellant also took out a parang. At that time SP9 told the deceased to run. SP9 ran towards the right towards some nearby shops while the deceased ran towards the left in the direction of a football field. As soon as SP9 reached the shops, he pleaded for his friends help to call the police. SP9 reached the area near the football field where he found many people there including the police. After he was allowed access into the football field, SP9 saw a body in a supine

position in an unconscious state and with wounds to the face and hands which he identified to be the deceased. SP9 said that he knew the two appellants because he lived near to the area where both the appellants lived. SP16 said that on 30 September 2016, he received instructions from the investigating officer ('SP17') to go to the scene of the incident. While there, SP16 saw a body covered with cloth. He also saw members of the public and a team from the Police Forensics Unit there on duty. At around 6.30am that day, SP15 and SP16 together with a team went to the address at Taman Mawar, Pasir Gudang and knocked on the door of the house. After about ten minutes, a female with Philippine's citizenship opened the door. SP15 and SP16 and his team searched the whole house. While conducting an inspection of the toilets, SP15 and SP16 saw a pair of legs dangling down from behind the water tank in the toilet located on top near the ceiling. When the police team managed to bring the person down from the water tank, they discovered there were in fact two persons hiding there. Both SP15 and SP16 identified the two men as the first and second appellants respectively in court. The police proceeded to arrest all the occupants of the said house. According to SP15 and SP16, as a result of interrogation carried out separately, both the appellants gave information of where some clothing's and weapons were kept. The High Court found both the appellants had the requisite common intention under s 34 of the Penal Code to commit murder under s 302 of the Penal Code. The version by the defence under all the circumstances did not raise a reasonable doubt as to their guilt. The prosecution has succeeded in proving their case against both appellants beyond a reasonable doubt in respect of the charge as proffered, and the High Court therefore convicted both appellants. Both counsels for the appellants argued that the conviction against the appellants was not safe on grounds that there was no maximum evaluation on the prosecution's case and the evidence leading to discovery pursuant to s 27 of the Evidence Act 1950 was inadmissible.

Held, dismissing the appeals:

(1) It was of the court's view that even though SP9 did not really see that the appellants had caused injuries to the deceased with the 'parang', what was very clear was that there were no other persons around that area where SP9 and the deceased met. The appellants came towards SP9 and the deceased and both SP9 and the deceased ran away in opposite directions before the deceased was found lying covered in blood with several slash wounds inflicted on him. The evidence by SP9 was admissible as it was so closely connected with the fact in issue (the murder of the deceased) as provided under s 7 of the Evidence Act 1950 (see para 57).

(2) The evidence is also clear that the appellants were hiding behind a water tank in the toilet of house No 02–03, Block 5, Taman Mawar, Pasir Gudang when they were arrested by SP15 and SP16. The appellants refused to surrender themselves until some force were used to effect the

arrest. We agree with the HCJ that such act fell under s 8 of the Evidence Act 1950. The HCJ had considered that s 8 of the Evidence Act 1950 applied (see para 60).

(3) The information under s 27 was not required by law to be in writing and the absence of it could not render the oral evidence given in court to be inadmissible. A written record of the information given by the accused would not by itself be substantive evidence of its contents and it was what the witness deposed in court as having been said by the accused that would be evidence. The court found that the oral testimony relating to the investigation carried out and the information given by the appellants was very clear and beyond any doubt. The court agreed with the finding of the HCJ that the police reports P37 and P44 were of mere corroborative value and it was the oral testimonies of PW15 and PW16 in court that constituted the substantive evidence under s 27 of the Evidence Act 1950 (see paras 63–64 & 69).

(4) The HCJ had made a finding that the appellants committed the murder of the deceased. Though there was no eyewitness who saw the murder and the evidence was circumstantial in nature, the court was satisfied that the evidence tendered in court provided sufficient connection to the appellants with the murder. The court found that there was no appealable error in the decision by the HCJ. The appeal had no merit. The court was satisfied that the conviction against the appellants were safe (see paras 72 & 75).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan hakim Mahkamah Tinggi ('HMT') yang mensabitkan mereka atas melakukan pembunuhan di bawah s 302 Kanun Keseksaan dan menjatuhkan mereka hukuman mati. Pada 29 September 2016, SP9 tiba di sebuah taman seorang diri untuk berjumpa dengan seorang rakan. Pada masa sama, si mati membuat panggilan telefon kepada SP9 untuk bertanyakan di mana si mati dan tidak lama kemudian si mati tiba di taman tempat SP9 menunggu rakannya. Semasa si mati melihat telefon bimbitnya, perayu pertama yang juga dikenali sebagai 'Fogi' dan perayu kedua dikenali sebagai 'Buhak' yang kedua-duanya memakai kain sarung, menghampiri mereka. SP9 mengenal pasti perayu pertama berdasarkan kerangkanya yang lebih tinggi berbanding dengan perayu kedua. Tiba-tiba arwah menjerit 'Pak lari'. Pada masa itu SP9 melihat perayu kedua mengeluarkan 'parang' dari kain sarungnya walaupun kemudiannya beliau berkata beliau tidak pasti dari mana perayu kedua mengeluarkan parang. SP9 berkata, beliau melihat perayu pertama turut mengeluarkan parang. Ketika itu SP9 menyuruh si mati lari. SP9 berlari ke arah kanan menuju ke beberapa kedai berhampiran manakala si mati berlari ke arah kiri menuju ke arah padang bola. Sebaik sahaja SP9 tiba di kedai, beliau merayu bantuan rakannya untuk menghubungi polis. SP9 sampai ke kawasan berhampiran padang bola di

mana beliau mendapati ramai orang di situ termasuk polis. Selepas dibenarkan masuk ke padang bola sepak, SP9 ternampak mayat dalam keadaan terlentang dalam keadaan tidak sedarkan diri serta luka di muka dan tangan yang dikenal pasti sebagai si mati. SP9 berkata, beliau mengenali kedua-dua perayu tersebut kerana beliau tinggal berhampiran dengan kawasan kediaman kedua-dua perayu. SP16 berkata, pada 30 September 2016, beliau menerima arahan daripada pegawai penyiasat ('SP17') untuk ke lokasi kejadian. Semasa di sana, SP16 ternampak mayat yang ditutup dengan kain. Beliau turut melihat orang awam dan sepasukan dari Unit Forensik Polis di situ sedang bertugas. Lebih kurang jam 6.30 pagi hari yang sama, SP15 dan SP16 bersama sepasukan pergi ke alamat di Taman Mawar, Pasir Gudang dan mengetuk pintu rumah berkenaan. Selepas kira-kira sepuluh minit, seorang wanita dengan kewarganegaraan Filipina membuka pintu. SP15 dan SP16 serta pasukannya memeriksa seluruh rumah. Semasa menjalankan pemeriksaan di tandas, SP15 dan SP16 melihat sepasang kaki terjuntai ke bawah dari belakang tangki air di dalam tandas yang terletak di atas berhampiran dengan siling. Apabila pasukan polis berjaya membawa orang tersebut turun dari tangki air, mereka mendapati sebenarnya terdapat dua orang bersembunyi di situ. Kedua-dua SP15 dan SP16 mengenal pasti kedua-dua lelaki tersebut masing-masing sebagai perayu pertama dan kedua di mahkamah. Polis terus menahan kesemua penghuni rumah tersebut. Menurut SP15 dan SP16, hasil soal siasat yang dijalankan secara berasingan, kedua-dua perayu memberi maklumat di mana beberapa pakaian dan senjata disimpan. Mahkamah Tinggi mendapati kedua-dua perayu mempunyai niat bersama yang diperlukan di bawah s 34 Kanun Keseksaan untuk melakukan pembunuhan di bawah s 302 Kanun Keseksaan. Versi oleh pembelaan dalam semua keadaan tidak menimbulkan keraguan munasabah tentang kesalahan mereka. Pihak pendakwaan telah berjaya membuktikan kes mereka terhadap kedua-dua perayu melampaui keraguan munasabah berhubung pertuduhan yang dikemukakan, dan oleh itu Mahkamah Tinggi mensabitkan kedua-dua perayu. Kedua-dua peguam bagi perayu berhujah bahawa sabitan terhadap perayu tidak dapat dipertahankan atas alasan tiada penilaian maksimum ke atas kes pendakwaan dan keterangan yang membawa kepada penzahiran menurut s 27 Akta Keterangan 1950 adalah tidak boleh diterima.

Diputuskan, menolak rayuan:

(1) Mahkamah berpandangan bahawa walaupun SP9 tidak benar-benar melihat perayu-perayu telah menyebabkan kecederaan kepada si mati dengan 'parang', apa yang jelas adalah tiada orang lain di sekitar kawasan tersebut di mana SP9 dan si mati berjumpa. Perayu-perayu datang ke arah SP9 dan si mati serta kedua-dua SP9 serta si mati melarikan diri ke arah bertentangan sebelum si mati ditemui dalam keadaan terbaring berlumuran darah dengan beberapa kesan tetakan padanya. Keterangan oleh SP9 boleh diterima kerana ia berkait rapat dengan fakta dalam

persoalan (pembunuhan si mati) seperti yang diperuntukkan di bawah s 7 Akta Keterangan 1950 (lihat perenggan 57).

(2) Keterangan juga jelas bahawa perayu-perayu bersembunyi di sebalik tangki air dalam tandas rumah No 02-03, Blok 5, Taman Mawar, Pasir Gudang ketika mereka ditahan oleh SP15 dan SP16. Perayu-perayu enggan menyerah diri sehingga tindakan paksaan digunakan untuk membuat penahanan tersebut. Kami bersetuju dengan HMT bahawa tindakan tersebut adalah di bawah s 8 Akta Keterangan 1950. HMT telah mengambilkira bahawa s 8 Akta Keterangan 1950 terpakai (lihat perenggan 60).

(3) Maklumat di bawah s 27 tidak diperuntukkan oleh undang-undang untuk dibuat secara bertulis dan ketiadaannya tidak boleh menyebabkan keterangan lisan yang diberikan di mahkamah tidak boleh diterima. Rekod bertulis mengenai maklumat yang diberikan oleh tertuduh bukan dengan sendirinya menjadi bukti substantif terhadap kandungannya dan ia adalah apa yang dikemukakan oleh saksi di mahkamah sebagai telah dikatakan oleh tertuduh yang akan menjadi keterangan. Mahkamah mendapati keterangan lisan berkaitan penyiasatan yang dijalankan dan maklumat yang diberikan oleh perayu adalah sangat jelas dan tidak diragui. Mahkamah bersetuju dengan dapatan HMT bahawa laporan polis P37 dan P44 hanya mempunyai nilai sokongan dan keterangan lisan PW15 dan PW16 di mahkamah yang membentuk keterangan substantif di bawah s 27 Akta Keterangan 1950 (lihat perenggan 63–64 & 69).

(4) HMT telah membuat keputusan bahawa perayu telah melakukan pembunuhan si mati. Walaupun tidak ada saksi yang melihat pembunuhan tersebut dan keterangannya adalah berdasarkan keadaan, mahkamah berpuas hati bahawa keterangan yang dikemukakan di mahkamah memberikan hubungan yang mencukupi kepada perayu dengan pembunuhan itu. Mahkamah mendapati tiada kekhilafan yang membolehkan rayuan dalam keputusan HMT. Rayuan tidak mempunyai merit. Mahkamah berpuas hati bahawa sabitan terhadap perayu adalah dikekalkan (lihat perenggan 72 & 75).]

Cases referred to

Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 109, FC (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)
Govind Krishna Jadhav v State of Maharashtra (1980) 82 BOMLR 173, HC (refd)
Hasamuddin bin Talena v PP [2002] 2 MLJ 408; [2002] 2 CLJ 504, FC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)

Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Md Desa bin Hashim v PP [1995] 3 MLJ 350, FC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Khoo Boo Hock & Anor [1990] 2 CLJ Rep 716, HC (refd)
PP v Magendran Mohan [2005] MLJU 243; [2005] 3 CLJ 592, HC (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79, FC (refd)
Sunny Ang v PP [1966] 2 MLJ 195; [1965] 1 LNS 171, FC (refd)
Tai Chai Keh v PP [1948-1949] supp MLJ 105b (refd)
Yii Soon Ho v PP [2014] 5 MLJ 547; [2014] 1 LNS 386, CA (refd)

Legislation referred to

Criminal Procedure Code s 182
Evidence Act 1950 ss 7, 8, 27
Penal Code ss 34, 300(a), (b), (c), (d), 302

Appeal from: Criminal Trial No 45B-04–03 of 2017 (High Court, Johor Bahru)

Muhammad bin Abd Kadir (Muhammad Abd Kadir & Co) for the first appellant.
Sukhaimi bin Mashud (Teh Poh Teik & Co) for the second appellant.
Dhiya Syazwani Izyan bt Mohd Akhir (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] The appellants appeal against the decision of the High Court judge ('the HCJ') who convicted them for committing murder under s 302 of the Penal Code (Act 574) and sentenced to death.

[2] The conviction against the appellants was based on the circumstantial evidence led by the prosecution. The HCJ found the evidences are sufficient to call the appellants to enter defence and having considered the defence evidence, the HCJ found the appellants failed to cast reasonable doubt on the charge made against them.

[3] The first appellant (Suaib bin Thandi) and the second appellants (Buhari bin Asmawin) are represented by different counsels. The learned deputy public prosecutor (DPP) is for the respondent. The first appellant is the first accused and the second appellant is the second accused at the High Court proceeding.

A **[4]** In this appeal, the first appellant's counsel raised two main grounds of appeal ie that the circumstantial evidence relied by the prosecution is weak or insufficient to call the first appellant to enter his defence and to find him guilty as such. The finding of prima facie case on the charge is wrong when the statements in the police report purportedly relied by the police as information
B leading to the discovery of weapons used during the murder of the deceased ought not to have been admitted as evidence under s 27 of the Evidence Act 1950. The second appellant's counsel also made the same complaint and adopted the submission of the first appellant's counsel and that the prosecution's main witness SP9's evidence is not credible.
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[5] We heard the oral submissions and also read the written submissions of counsels for both the appellants. The learned DPP has also made her submission and relies on her written submission. Having read the records of
D appeal and considered the grounds raised and the reply by the learned DPP, we find there is no merit in the appeal. There is no appealable error in the HCJ's decision. We find the conviction against both the appellants is safe. It is our unanimous decision that the appeal is dismissed and the decision of the HCJ is affirmed.
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[6] We give our reasons for dismissing the appeal.

THE CHARGE

F **[7]** The charge under s 302 read together with s 34 of the Penal Code against the appellants reads as follows:

> Bahawa kamu bersama-sama antara jam 11.30 malam 29.9.2016 hingga 12.29 pagi 30.9.2016, bertempat di Padang Bola, Blok 2, Jalan Mawar, taman mawar, 81700
G Pasir Gudang di dalam Daerah Johor Bharu, di dalam Negeri Johor Darul Takzim, telah melakukan bunuh dengan menyebabkan kematian terhadap Amar Bin Miralde; No Sijil Kelahiran: SPA 4355/94 dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 KK dibaca bersama dengan seksyen 34 kanun yang sama.

H FACTS OF THE CASE

[8] On 29 September 2016 at about 11pm. SP9 arrived at a park at Block 2, Taman Mawar alone in a Perodua Kancil to meet up with a friend. At the same
I time, the deceased made a telephone call to SP9 to ask where the latter was and not long after, the deceased arrived at the park where SP9 was waiting for his friend. While the deceased was looking at his hand phone, the first appellant, who was also known as 'Fogi' and the second appellant, known as 'Buhak' who were both clad in sarongs, walked slowly while approaching them.

[9] SP9 identified the first appellant based upon his taller frame as compared to the second appellant. All of sudden the deceased cried out 'Pak lari'. At that time SP9 saw the second appellant took out a 'parang' from his sarong although he later said he was not quite sure where the second appellant took out the *parang* from. SP9 said that he saw the first appellant also took out a *parang*. At that time SP9 told the deceased to run. SP9 ran toward the right direction toward some nearby shops while the deceased ran towards the left in the direction of a football field.

[10] As soon as SP9 reached the shops, he pleaded for his friends help to call the police. Not long after, SP9 said that a man on a motorbike asked him 'bukan kau punya kawan tu yang gaduh sana?'. Upon hearing this, SP9 proceeded accordingly and within ten minutes reached the area near the football field where he found many people there including the police.

[11] After he was allowed access into the football field, SP9 saw a body in a supine position in an unconscious state and with wounds to the face and hands which he identified to be the deceased.

[12] SP9 said that he knew the two appellants because he lived near to the area where both the appellants lived.

[13] SP16 said that on 30 September 2016 at around 1am, he received instructions from the investigating officer (SP17) to go to the scene of the incident. While there, SP16 saw a body covered with cloth. He also saw members of the public and a team from the Police Forensics Unit there on duty. At around 6.30am that day, SP15 and SP16 together with a team went to the address at 02–03, Block 5, Taman Mawar, Pasir Gudang and knocked on the door of the house. After about ten minutes, a female with Philippine's citizenship opened the door.

[14] SP15 and P16 saw a Filipino man saying his prayers in the living room. SP15 and SP16 and his team continued to search the whole house. While conducting an inspection of the toilets, SP15 and SP16 saw a pair of legs dangling down from behind the water tank in the toilet located on top near the ceiling. When the police team managed to bring the person down from the water tank, they discovered there were in fact two persons hiding there. Both SP15 and SP16 identified the two men as the first and second appellants respectively in court. The police proceeded to arrest all the occupants of the said house

[15] According to SP15 and SP16, as a result of interrogation carried out separately, both the appellants gave information of where some clothing's and weapons were kept.

A FINDING AT THE END OF PROSECUTION'S CASE

[16] The High Court found both the appellants had the requisite common intention under s 34 of the Penal Code to commit murder under s 302 of the Penal Code based on the evidence which can be summarised as follows:

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(a) the deceased was dead. This was confirmed by SP14 who performed the post mortem on the deceased. There were two wounds to the head region of the deceased that caused his death. The appellants caused the injuries that led to the death of the deceased. SP9 also identified the deceased albeit from photographs shown to him in court;

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(b) the narrative of prosecution case pointed towards the first and second appellants who committed the murder. The finding is based on the evidence of SP9 that while waiting for a friend at Taman Mawar Flat's Block, his son, the deceased came by and while they were there, the deceased saw the first and second appellants walking in their direction and both were holding parangs. At that juncture, the deceased cried out 'Pak lari' indicating to his father to run. Both SP9 and the deceased were subsequently chased by the appellants. SP9 knew the appellants by their nicknames of 'Buhak' and 'Fogi'. Buhak was identified by SP9 as the second appellant while Fogi was identified by SP9 as the first appellant. The evidence of SP9 also showed that he and the deceased ran in opposite directions before the deceased was found lying covered in blood with several slash wounds inflicted on him. SP9 also said that someone on a motorcycle passed by and asked him if his friend was fighting over there. SP9 also admitted that he knew the appellants;

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(c) the circumstances show that it was ultimately the deceased who finally ended up dead with several slash wounds. SP9's evidence was that both appellants were armed with parangs. The circumstances unmistakably show that the accused persons were the aggressors and this resulted in the death of the deceased;

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(d) the post mortem conducted by doctor Rohaya bt Shahar (SP14) showed that there were more than ten slash wounds to the deceased including to the head of the deceased. The cause of death was confirmed by SP14 to be 'slash wound to the head'. These results were contained in a post mortem report (P34). This showed that the deceased was the victim and not the aggressor as suggested by the defence;

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(e) from the nature of the injuries sustained by the deceased including the weapons used to inflict those injuries, it can be concluded that the appellants caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death in accordance with limb (c) to s 300 Penal Code;

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(f) one other factor that enabled the fair inference to be made that the

appellants were responsible for inflicting the fatal wounds on the deceased was their conduct in deciding to seek refuge in the house of the Filipino couple;

(g) the evidence as gathered from a combination of the circumstances was thus inconsistent with any other hypothesis than that of the guilt of the appellants. There was therefore sufficient circumstantial evidence to connect both the accused to the death of the deceased;

(h) the nature of the injuries leading to the deceased's death also could not have been caused by the helmets found in the vicinity where the deceased's body lay in the field as suggested by the defence and further held that even if it were true that there were others present at the football field, this was not however something that affected the quality of the prosecution evidence, especially that given by SP9 who was categorical that it was the accused persons who were responsible for the attack on the deceased and in giving chase to him;

(i) in inflicting the injuries upon the deceased, the accused persons were possessed with the requisite intention under s 300(a), (b), (c) or the requisite knowledge under (d) of the Penal Code;

(j) drawing upon the circumstances as gathered from the testimony of SP9 and the incontrovertible fact that the deceased was found a short while later dead within the vicinity from slash wounds, it can be reasonably inferred that both the appellants had formed a common intention to inflict injuries on both SP9 as well as the deceased; and

(k) the fact that both appellants were armed with parang's clearly indicates that they approached SP9 and the deceased with intent to cause the harm and to inflict injuries on them.

THE DEFENCE'S CASE (FIRST APPELLANT)

[17] The first appellant's defence is as follows:

(a) he resided in Pasir Gudang at Flat No 3, Taman Mawar in Johor Bahru (JB) where he lived together with persons named Indani, Toto and Sachim, and he does not recognize the name of Datu Karnu (SP9) but if he saw his face he may be able to identify him. He knows SP9's name but he knew that he had an argument with his older brother named Indani. SP9 has a daughter and that Indani's son named Toto was proposing marriage to her. However, SP9 had requested for a higher dowry and this was the source of the differences between them. The relationship between PW9 and Indani was already strained even before the incident which resulted in the death of the deceased;

(b) he knew SP9 as Samak. On 29 September 2016 at around midnight and while he was in his flat, he heard the sound of car horns coming from below. When he went to the window to look out, he saw Samak (SP9) calling for Indani and Toto. Since it was already midnight and he did not want any violence to ensue, he went downstairs with Buhari, the second appellant;

(c) he told SP9 and the other person he was with whom he does not know, that as everyone was already asleep, they should go home. SP9 ignored the request and continued to ask him where was Indani and Toto. He replied that they were not in the flat at the time but SP9 replied that he would then deal with him and the second appellant instead;

(d) SP9 and the person accompanying him then went back into their car and SP9 took out a weapon, that looked like a big knife and the other person brought out a belt with a big buckle. As SP9 was about to approach him and second appellant, they ran away with SP9 giving chase to him and the other person chasing the second appellant. He ran towards Block 6 which was behind Block 3 but he did not know where the second appellant because they had already separated during the chase;

(e) he was only clad in a sarong and was not wearing any underwear and wore a shirt 'baju Melayu'. It was impossible for him to run with the sarong without it falling down unless he held it up with his hand. This was why it was not possible for him to hold a weapon in his hand;

(f) when SP9 chased him toward Block 6, he stayed for a few minutes at Block 6. He then wondered what had happened to the second appellant and so he went back to Block 3. When he reached Block 3, he went inside his flat and looked out the window and he saw some commotion taking place at the badminton court but he could not see what was happening clearly as it was already dark. He did not know what the commotion was all about. He and the second appellant then left Block 3 and went towards Block 5 where their friends were. This was also because both the accused were frightened that SP9 and the other person will come after them with their weapons. Their friends at Block 5 were a couple, namely, Mat Jini and his wife, Hjh Amnah. At Block 5, both the accused slept over and, in the morning, they heard a knock on the door;

(g) because he and the second appellant had no proper identification documents, they decided to hide in the toilet. As they looked from the toilet, they saw Hjh Aminah opening the door for the police. The police went to the toilet but could not open the door as they had locked it from the inside. After the police forced open the door, they took them out of the toilet and proceeded to handcuff them;

(h) the police brought him and the second appellant to a badminton court where they produced a weapon resembling a knife and placed it on the floor of the badminton court and told both accused to point towards the knife; and

(i) he did not know who the person was who accompanied SP9 that night until he came to court for his case. He denied that when he came down from his flat he held a weapon as alleged by SP9. He also denied that the second appellant held a weapon.

THE DEFENCE'S CASE (SECOND APPELLANT)

[18] The second appellant's defence is as follows:

(a) on 29 September 2019 while he was at his residence at Level 3, Block 3, Taman Mawar, Pasir Gudang, he heard the continuous sound of horning from a car coming from below. The person who sounded the car horn also was cursing as if he was not satisfied with something. He went downstairs to see what was happening and the first appellant 'Fogi' also went downstairs;

(b) the first appellant told him that SP9 was looking for his uncle and the second appellant followed him in order to tell SP9 not to make noise and cause any trouble as people were already sleeping;

(c) SP9 asked where Indani and Toto were but the first appellant said that they were not at the flat. SP9 was not satisfied with this answer and went back to his car and took out a 'parang' while the other person brought a belt with a metal buckle and started to chase them. SP9 chased the first appellant while the other person chased the second appellant. He managed to escape from the person who chased him but did not know what happened to the first appellant because SP9 chased the first appellant in another direction. After he backtracked to Block 3, he reunited with first appellant at the football field;

(d) he saw people fighting at a field nearby Block 3 and some people running but could not see clearly because it was dark. He did not know what happened to SP9 and the other person with him; and

(e) both he and the first appellant then went to Block 5 as they were afraid that SP9 and the other person would look for them again. They went to their friend's house at Block 5 namely, Mat Jini.

FINDING AT THE END OF THE DEFENCE'S CASE

[19] The HCJ found the version of the defence as to the events on the day in question is diametrically opposed to the prosecution's version. The defence contends that it was in fact SP9 and the deceased who gave chase to the two

A appellants. The defence also portrayed the deceased and PW9 as the aggressors and further said that the appellants could not have given chase as they were wearing sarongs so that it was not possible for them to have chased the deceased and PW9 while holding parangs without their sarongs falling off. It was also suggested that this was improbable because the appellants said that they were
B not wearing any underwear.

[20] Having considered both the versions given by the prosecution and the defence and having juxtaposed both, the HCJ found the defence version
C cannot be believed and neither does it raise a reasonable doubt in the prosecution's case.

[21] The HCJ found the plain fact of the matter is that the deceased died from slash wounds, the immediate cause of death being stated as being 'slash
D wound to the head'. This was confirmed by SP14. The relevant question to be answered is how the deceased sustained these wounds.

[22] The HCJ considered the issue raised by the defence that there being other persons possibly present that would suggest that the deceased was
E attacked by others and not the appellants. The defence pointed out the presence of two helmets not far from the deceased and a folded piece of paper also close by the deceased's body which they said indicated the presence of others as neither the two appellants or SP9 and the deceased wore helmets. The
F HCJ held that in the absence of anything more, the presence of the helmets and the piece of paper do not reasonably give rise to the inference that others were present.

[23] The cogent testimony of SP9 indicate that it was the appellants who
G gave chase to him and the deceased. There were no other eye witnesses to the fact that the death of the deceased might have been caused by persons other than the appellants.

[24] There was also no evidence that the belt with the metal buckle allegedly
H carried by the deceased was ever found in the vicinity of the flats or at the scene of the incident. All the circumstances point to the fact that it was the appellants and not SP9 or the deceased who possessed the weapons.

[25] The version by the defence under all the circumstances do not therefore
I raise a reasonable doubt as to their guilt. The defence has therefore failed to raise a reasonable doubt in the prosecution's case. The prosecution has succeeded in proving their case against both appellants beyond a reasonable doubt in respect of the charge as proffered, and the High Court therefore convicted both appellants.

THE APPEAL

[26] Both counsels for the appellants argued that the conviction against the appellants is not safe on grounds that here was no maximum evaluation on the prosecution's case and the evidence leading to discovery pursuant to s 27 of the Evidence Act 1950 is inadmissible.

[27] It was submitted that had the HCJ thoroughly assessed the evidence he would have found that there was break in the chain of circumstantial evidence and that reliability of the important prosecution's witnesses was doubtful, hence no prima facie. According to counsel, firstly, there was no eye witness to the incident. At the most the appellants were allegedly seen chasing the deceased allegedly with a *parang*. Secondly, no witness was called to testify on the subsequent event. The evidence was therefore circumstantial in nature. It was submitted that the evidence was not sufficiently strong to connect the appellants to the deceased's death.

[28] At the trial before the HCJ, an issue was raised on the discovery of two crash helmets and folded newspaper. The two crash helmets marked as P14(1)(A) and P14(2)(A) and the folded paper marked as 12(2)(A). The HCJ held that mere presence of the two helmets does not, in the absence of anything more, lead to the conclusion that there were others involved in the act. It was argued that the finding could not be sustained. The HCJ should have asked himself what the two helmets were doing in the field rather than dismissing it outright. It was only reasonable to say that the two helmets would not land in the field without somebody bringing and leaving it there. It was submitted that the only reasonable inference was that someone must have been at the scene that night. Further, the folded paper 12(2)(A) was equally important piece of evidence. Unfortunately, it did not impress the HCJ by holding that the defence submission was speculative was untenable. It was submitted that from the photograph (P5(14)) at p 748 Vol 3 AR it could be said that the paper was folded in such a way that it was to be used to sheath a knife or blade. Again, somebody must have brought it there. And that person must have been present at the field that night. It would be reasonable to infer from these set of fact that there could be more than two weapons used and a number of individuals involved.

[29] It was submitted that the evidence of the DNA chemist that the deceased's blood stain was found at the handle of the parang (P12(3)(A) (p 203 Vol 2 AR) cannot be correct. Logically if the parang was used to slash the deceased his bloodstain would have been found on its blade. Therefore, it would be reasonable to say that the deceased, during the incident, was the one

holding P12(3)(A). Another parang (P15(1) was found. It didn't bear the appellants' DNA. No stain of the deceased's blood was found either. Again, it would be reasonable to say that the appellants had no connection with this *parang*.

[30] Based on the above submissions, it was submitted that the fact is consistent with other hypothesis other than the appellants culpability. With these unsatisfactory features it could not be said the strand of circumstantial evidence was strong enough to point to their guilt.

[31] It was also submitted that SP9 was the only witness who last saw the appellants as well as the deceased. He said that night the deceased met him when suddenly they came and chased him. Both SP9 and the deceased ran a separate direction. He was then told by a person unknown to him that something happened to his friend and later was brought to the scene by that person. What was strange here was how did the person know SP9 was related to the deceased when that person was stranger to SP9? SP9 ran towards a restaurant and stayed there. He came to the scene only after police was there. It was quite unbecoming of a person to leave his close relation unassisted. At least SP9 should have looked for the deceased. He did not visit the deceased at the hospital neither did he lodge a police report He changed his version in regards to whether he saw the incident. In examination in chief SP9 said he did no see what happened at the scene (p 233 Vol 2 AR). In cross examination he said otherwise (p 272 Vol 2 AR). SP9 was inconsistent. His evidence was not inspiring confidence. His evidence should have been rejected. If at all SP9 could be believed at the most the appellants seen chasing the deceased with a parang. There was no evidence on the subsequent event. With the existence of the crash helmets and the folded paper, the evidence that the appellants were chasing the deceased was insufficient to relate him to the deceased's injuries.

[32] The other point is that the appellants were found hiding inside the bathroom when the arresting team came. It was submitted that merely because they were trying to avoid arrest does not necessarily mean they had connection with the incident. It could possibly be due to his status as an illegal immigrant.

[33] It was also argued that the statements in the police report purportedly relied by the police as information leading to the discovery of weapons used during the murder of the deceased under s 27 of the Evidence Act 1950 is inadmissible. The HCJ ruled that the information obtained from the accused persons that led to the discovery of some clothing and weapons was admissible. To be specific those items were Paul Smith shirt P12 (9)(A), *Baju Melayu* P12(6)(A), *kain sarong* P12(5)(A) and sandal P12(7)(A) and the two *parang*s in exhs P15(1) and P12(3)(A) respectively. The alleged information as testified by SP16 was worded in the following manner (p 446 Vol 2(1) AR):

S: Daripada soal siasat, hasilnya apa yang kamu perolehi? A

J: Hasil soal siasat tersebut, suspek ada memberitahu kepada saya, bahawa dia boleh tunjukkan kepada saya dimana dia simpan pakaian dan juga senjata yang digunakan semasa kejadian tersebut.

S: Seterusnya apa yang kamu buat?

B

J: Seterusnya saya membuat 1 laporan polis seperti mana Seri Alam repot 10139/16

Subsequently the aforesaid items were recovered by SP15 and SP16. Clothing in P12(9)(A), P12(6)(A), P12(5)(A) and P12(7)(A) were found in the house while the two parangs P15(1) and P12(3)(A) were found at the field.

C

[34] It was submitted that the HCJ sieved the alleged information and admitted certain portion of it. HCJ's ruling was at p 41 Vol 1 AR:

(86) I have however only taken into account the above wordings 'saya boleh tunjukan dimana saya simpan pakaian dan senjata' or 'I can show you where I kept the clothing's and weapons' for the purposes of s 27 of the Evidence Act 1950 ('the EA') and not the words 'yang saya gunakan pada hari hejadian' or 'I used during the incident' because I find that the additional words do not distinctly relate to the discovery of the items recovered under s 27 of the EA.

D

E

[35] HCJ relied on this s 27 information to infer that the appellants were responsible for the deceased's injuries (p 55 Vol 1 AR). It was submitted that HCJ was wrong in admitting the s 27 information. The reasons being that the propriety of the information was doubtful and the information was a joint statement.

F

[36] Two police reports were lodged on the 30 September 2016 by both SP15 and SP16 respectively. They were marked as P37 and P44 (p 827 and p 834 Vol 3 AR). Both reports were made almost at the same time. Subsequently on the same date another police report marked as P45 (p 835 Vol 3 AR) was lodged by SP16. The three reports contained the purported discovery information from the second appellant and the first appellant. P44 was in relation to the information from the second appellant while P37 was in respect of the information from the first appellant. The contents of both P37 and P44 were identical. The essential part of both reports read as follows:

G

H

... Tuan saya boleh tunjukkan dimana saya simpan pakaian dan senjata yang saya gunakan pada hari kejadian. Kemudian saya jadikan pengakuan ini sebagai satu laporan.

[37] The appellants contended that s 27 Evidence Act 1950 only allows first information that distinctly relates to the discovery. Therefore, an information obtained from a joint statement or same statement from more than one person cannot be admitted. The judicial statement in *Govind Krishna Jadhav v State of Maharashtra* (1980) 82 BOMLR 173 pronounced that:

I

The joint statement is a statement made by two persons simultaneously. Such a situation is practically inconceivable especially with reference to s 27 of the Evidence Act. Two or more persons cannot in chorus make a statement contemplated by s 27. A joint statement must in practice mean the same statement or similar statements made by two or more persons. In such a case only, the statement which is made earlier and which leads to the discovery will be admissible under s 27 of the Evidence Act and the subsequent statement or statements will not be.

[38] It is only the first statement that is admissible. The Federal Court in *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 is categorical on this:

Therefore, in a case where the accused makes more than one statement in relation to the whereabouts of a particular thing, it is only the first statement that is admissible, the second is not.

[39] It was submitted that in this case, two identical statement were made by both the second appellants and the first appellants. If the time the statement was given is considered, their statement would be inadmissible.

[40] Further, the police report P45 was in relation to the discovery of the two parangs. Both the second appellants and the first appellants allegedly gave the information leading to its whereabout. It was made jointly. The relevant statement in P45 is reproduced as follows:

kedua-dua OKT penama Suaib dan tangkapan penama Bukhari telah menunjukkan kepada saya — tuan itu parang — lalu saya bertindak membuat pemeriksaan dapati terdapat dua bilah parang.

[41] Based on *Govind Krishna* and *Md Desa*, the appellants submitted that the information was inadmissible as it could not be identified who gave the first information. Apart from the fact that they were both identical the same officer (D/SJN 127297) was present at both interrogation places at the same time which did not sound logical and there were contradictions in the discovery statement. It was further submitted that both SP15 and SP16 gave differing version in regard to the manner the second appellant and the first appellant pointed out the place. It is the requirement of the law that the statement must be exact (*Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408; [2002] 2 CLJ 504). The evidence given by SP15 and SP16 are shown to us as follows:

At p 365 Vol 2(1) AR SP15 said:

S: *Pada waktu tersebut, bagaimana keadaan kedua- dua tangkapan ini?*

J: *Kedua-dua tangkapan ini bergari.*

S: *Inspektor nyatakan ya, kedua-dua tangkapan ini telah bawa ke tempat tersebut ya kemudian menunjukkan ya tempat itu. Macam mana mereka tunjuk?*

J: *Gesture. Melalui muka dan tangan.*

At p 450 Vol 2(1) AR, SP16 said:

S: Apa yang kamu nampak.

J: *Satu kawasan semak, ditumbuhi pokok Tuan.*

S: *Apa berlaku disitu?*

J: *Sampai disana, kedua-dua suspek ini beritahu kepada saya bahawa 'itu parang' sambil ditunjukkan kepada saya ke arah semak dibawah pokok tersebut.*

[42] In view of these unsatisfactory features the HCJ ought to exercise his discretion to exclude the statement (*Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507).

[43] There was no evidence given on the information that caused the discovery of the clothes and the parangs. What appeared to be the evidence, as admitted by the HCJ was 'saya boleh tunjukkan dimana saya simpan pakaian dan senjata' without more. It was submitted that such evidence had only little value and of no effect unless the discovery was accompanied with such evidence (*Tai Chai Keh v Public Prosecutor* [1948-1949] supp MLJ 105b; *Public Prosecutor v Khoo Boo Hock & Anor* [1990] 2 CLJ Rep 716).

[44] In conclusion, both the appellants submitted that the conviction was unsafe. The appellants pray that the conviction and sentence be set aside.

[45] In reply, the DPP submitted that the HCJ has made a correct finding of prima facie case on the charge of murder under s 302 of the Penal Code (Act 574) against the appellants. The evidence tendered by the prosecution is circumstantial in nature however, the narrative of the prosecution and the evidence by witnesses showed sufficient link to the appellants with the death of the deceased.

[46] It was also submitted that the HCJ has carefully considered the appellants' defence in compliance with s 182 of the Criminal Procedure Code. The whole defence evidence given during the full trial was produced and duly considered. This can be seen from paras 165–216 in the grounds of judgment of the High Court (at p 72–85 of *RR* (Vol 1)). The entire defence evidence has been analysed by the HCJ. This is found at paras 221–272 in the grounds of judgment of the High Court (at p 87–101 of *RR* (Vol 1)).

[47] It is not disputed that the evidence by the prosecution main witness in SP9 has been carefully scrutinised by the HCJ and SP9's evidence is accepted as credible evidence. SP9's evidence has been evaluated in great length and considered by the HCJ. The appellants' counsels attempted to challenge the

A credibility of SP's evidence in this appeal. The DPP submitted that since the HCJ is the trial judge who have the audio and visual advantage to see the demeanour of the witnesses, and made a finding that SP9 is a credible witness, an appellate court should be slow to interfere or disturb such finding. SP9's evidence must be accepted as conclusive of the narrative given leading to the B death of the deceased.

[48] The HCJ has considered the appellants' defence and made a finding that the defence by the appellants that the deceased was the 'aggressor' contradicts SP9's evidence that the appellants chased after him and the C deceased with 'parangs'. Thereafter, the deceased was found dead with several wounds inflicted on his body. This is confirmed by SP14 that the deceased cause of death is 'slash wound to the head'. The evidence is very clear showing the deceased was not the person who has attacked the appellants as portrayed in the appellants' defence. D

[49] The DPP also submitted that the appellants' defence in the trial is not 'self-defence' though they contended that the deceased was the one who attacked them. The injuries on the deceased which caused his death does not E show that the injuries suffered were due to an act of attacking the appellants. The evidence by SP14 who is as an expert witness, her evidence has not been rebutted or cast any doubt by the appellants.

[50] On the issue of evidence under s 27 of the Evidence Act 1950, the DPP F submitted that the evidence is relevant which was correctly admitted and accepted by the HCJ. It was also submitted that the same issue has been raised before the HCJ and was considered. This can be found at paras 77–99 in the grounds of judgment of the HCJ. The HCJ has applied the correct principles of law pronounced in the case laws cited in the judgment. The HCJ has made G a correct finding on the admission of the statements under s 27 of the Act and there is no reason to disturb his finding.

[51] The appellants argued that there is no clear information or specific given by the appellants in exhs P37 and P34 to be classified as information H under s 27 of the Act. There is another issue raised by the appellants, that there are two information in two police reports which resulted in 'joint statement' and this does not comply with s 27 of the Act.

[52] The DPP submitted that the appellants' submission is untenable and I without merit. It is very clear that exhs P37 and P44 though the exhs did not specifically state or mention what were the words told by the appellants to SP15 and SP16, it does not prejudice the evidence on the discovery of the clothes and the weapon 'parang' which are relevant evidence under s 27 of the Act relying on the Federal Court's case of *Amathevelli a/p P Ramasamy v Public*

Prosecutor [2009] 2 MLJ 367; [2009] 3 CLJ 109.

[53] In conclusion, it was submitted that there is no appealable error in the judgment of the HCJ. The conviction against the appellants is safe. The DPP prays that the appellants' appeal is dismissed and the decision by the High Court is affirmed.

OUR DECISION

[54] We have considered the submissions of the appellants and the respondent oral and written and read the grounds of judgment of the HCJ. The facts of the case as stated in the grounds of judgment at paras 1–30 are not disputed. The narrative of the prosecution case that there were no eye witnesses to the killing of the deceased, the evidence against the appellants are circumstantial in nature.

[55] In the grounds of judgment, the HCJ has applied the correct principle of law relating to circumstantial evidence. It is correctly stated that the law is such that although a conviction can be sustained by reliance on circumstantial evidence, it must admit of no other possibility other than that it was the accused or accused persons who committed the murder. Where the evidence is of a circumstantial nature, the burden upon the prosecution is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused and if there are gaps in it, then it is not sufficient (*Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579; *Yii Soon Ho v Public Prosecutor* [2014] 5 MLJ 547; [2014] 1 LNS 386; *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171; *Public Prosecutor v Magendran Mohan* [2005] MLJU 243; [2005] 3 CLJ 592; *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36).

[56] The HCJ has made a finding that the narrative of prosecution case pointed towards the first and second appellants who committed the murder. The finding is based on the evidence of SP9 which has been carefully analysed by the HCJ at paras 60–69 and other witnesses at paras 70–76 in the grounds of judgment. It cannot be denied that SP9 was the last person who saw the deceased. The appellants was seen taking out 'parang' and charging towards the deceased. The appellants contended that in examination in chief SP9 said he did no see what happened at the scene and in cross-examination he said otherwise. SP9 was inconsistent and further, there was no evidence on the subsequent event.

[57] In our view, even though, SP9 did not really see the appellants had caused injuries to the deceased with the 'parang', what is very clear is that there were no other persons around that area where SP9 and the deceased met. The

appellants came towards SP9 and the deceased and both SP9 and the deceased ran away in opposite directions before the deceased was found lying covered in blood with several slash wounds inflicted on him. The evidence by SP9 is admissible as it is so closely connected with the fact in issue (the murder of the deceased) as provided under s 7 of the Evidence Act 1950 ie facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity of their occurrence or transaction, are relevant.

[58] The appellants also contended that with the existence of the crash helmets and the folded paper (exhs P14(1)(A) and P14(2)(A)), in the field approximate to the place of incident, the evidence that the appellants were chasing the deceased was insufficient to relate him to the deceased's injuries. The HCJ has made his finding on this issue and held that the mere presence of the two helmets does not, in the absence of anything more, lead to the conclusion that there were others involved in the act. To the contrary there was direct and cogent evidence from SP9 that he and the deceased were chased by the appellants brandishing *parang*s (see: para 151 in the grounds of judgment). In fact, the HCJ has considered the issue of the presence of helmets and the folded paper at paras 149–155 in the grounds of judgment. The HCJ concluded that the submission by the defence to be speculative and based on conjecture. The mere fact that a piece of paper happened to fit the shorter parang does not necessarily equate to there being another weapon used (at para 154).

[59] It is also noted that the HCJ has considered the post mortem report conducted by SP14 ie that there were more than ten slash wounds to the deceased including to the head of the deceased. The cause of death was confirmed by SP14 to be 'slash wound to the head which injuries are consistent with SP9' evidence that the appellants who had attacked the deceased with the 'parang' contrary to the defence story that the deceased was the aggressor which SP9 denied. The HCJ has considered this fact and made his finding at paras 70–73 in the grounds of judgment, inter alia, that the circumstances unmistakably show that the accused person were the aggressors and this resulted in the death of the deceased. He found the deceased was the victim and not the aggressor as suggested by the defence. The nature of the injuries leading to the deceased's death also puts paid to the submission by learned counsel of the first appellant that the helmets found in the vicinity where the deceased's body lay in the field was of any significance.

[60] The evidence is also clear that the appellants were hiding behind a water tank in the toilet of house No 02–03, Block 5, Taman Mawar, Pasir Gudang when they were arrested by SP15 dan SP16. The appellants refused to surrender themselves until some force were used to affect the arrest. We agree

with the HCJ that such act falls under s 8 of the Evidence Act 1950. The HCJ has considered that s 8 of the Evidence Act 1950 applies.

[61] The Federal Court in the case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 held as follows:

> [28] Evidence of conduct is admissible under s 8 of the Evidence Act 1950 ('s 8'), which reads as follows:
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against Whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> [29] Illustration (i) to s 8 reads as follows:
>
> A is accused of a crime.
>
> The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.
>
> [30] In commenting on the admissibility of evidence of conduct under s 8 *Sarkar on Evidence* (15th Ed) says at p 175:
>
> The conduct of party to a proceeding or his agent in reference to such proceeding at the time when the facts occurred out of which the proceeding arises, or in reference to any fact in issue or relevant fact, or the conduct of the complainant, is relevant, but the condition precedent to its admissibility as 'conduct' is leaf it must directly influence or be influenced by a fact in issue or relevant fact and such conduct does not include action resulting from other causes or circumstances. It must be the essential complement of the act done or refused to be done. Conduct includes antecedent or subsequent conduct involving both actions and statements.
>
> And at p 194:
>
> What is meant by the words, if such conduct influences or is influenced by any fact in issue or relevant fact, is that there must be a direct or immediate relation between the conduct and the fact in issue. Conduct which is brought about by some other agency though connected with the facts in issue is not relevant conduct.
>
> [31] The effect of evidence that complies with the requirements of s 8 and when it does not can be seen in the case of *Kuldip Sharma v The State* [1996] CriLJ 244 where JB Goel J said at pp 250–251:
>
> The occurrence had taken place sometime during night of first or second 1985.

The accused was found absent from his house next morning. He was absconding after the occurrence. Learned counsel for the appellant has contended that the mere fact of absconding or having been last seen together, is not incriminating circumstance justifying conviction. For this, he has relied on *State of Rajasthan v Smt Kamala* AIR [1991] SC 967, *lnderjit Singh v State of Punjab,* AIR [1991] SC 1674, *Satish Kumar v State* [1994] (IV) CCR 2579 *Lakhanpal v State Of Madhya Pradesh* [1979] CriLJ 1217 (SC). In these cases, except the evidence of last seen together or absconding, no other circumstantial evidence was proved or found reliable and trustworthy to form a chain of circumstances complete enough to base conviction. The conduct of the accused soon after fee incident plays an important part in the determination of the guilt and is a corroborative piece of evidence. Disappearance of the accused after the occurrence is a relevant circumstance which in the absence of any plausible explanation, could be taken into consideration against him as conduct under s 8 of the Indian Evidence Act. In the present case, firstly, there is no material on the record to show why the deceased would have committed suicide. The accused was present at the time of the concurrence and if it was a case of suicide, there is no material brought on the record to show that the accused had taken any steps either to prevent her from so doing or get her medical aid immediately. As a normal human conduct on the death of a near kith and kin, one laments and would raise hue and cry and even take assistance and counsel from the neighbours and the accused had cordial relations with his immediate neighbours. Instead of doing so, he had stopped away and remained absconding for several days. This conduct certainly destroys presumption of innocence on his part.

[62] The crux of the appellants argument cantered around the statements in the police report as information leading to the discovery of weapons used during the murder of the deceased under s 27 of the Evidence Act 1950 is inadmissible. The appellants contended that s 27 Evidence Act 1950 only allows first information that distinctly relates to the discovery. Therefore, an information obtained from a joint statement or same statement from more than one person cannot be admitted. The contents of both P37 and P44 were identical stating.

[63] The HCJ has considered the argument however, ruled that the information obtained from the appellants that led to the discovery of some clothing and weapons was admissible. In our considered view, the decision by the HCJ is correct. The Federal Court in *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 109 held that the information received under s 27 of the EA needs to be proved by way of oral evidence and any contemporaneous written record of it only amounts to corroboration. The information under s 27 is not required by law to be in writing and the absence of it cannot render the oral evidence given in court to be inadmissible. *Thus, a written record of the information given by the accused will not by itself be substantive evidence of its contents and it is what the witness deposes in court as having been said by the accused that will be evidence*.

[64] We examined SP16's evidence below and we find the oral testimony relating to the investigation carried out and the information given by the appellants is very clear and beyond any doubt. At p 149, *RR Jld* 2(1), SP16's evidence is as follows:

S: Untuk kamu, apa yang kamu buat pada tarikh tu?

J: Pada 30 September 2016, pada jam lebih kurang 8.45 pagi, saya bersama dengan Sarjan Razman dan juga Kpt Yuslin Hasrizal, telah soal siasat awal terhadap suspek bernama Bhari bin Asmawin.

S: Daripada soal siasat, hasilnya apa yang kamu perolehi?

J: Hasil soal siasat tersebut, suspek ni memberitahu kepada saya, bahawa dia boleh tunjukkan kepada saya dimana dia simpan pakaian dan juga senjata yang digunakan semasa kejadian tersebut.

At p 153, *RR Jld* 2(1):

S: Dengan apa?

J: Bersama Inspektor Sathya dan dengan berjalan kaki dari Blok 5 ke tnmpat kejadian.

S: Kamu kata tadi ada padang?

J: Ya.

S: Selepas sampai disitu, kamu buat apa?

J: Selepas sampai disitu, kedua-dua suspek ini Buhari dan Asmawin telah tunjukkan kepada saya di satu kawasan semak tuan.

S: Semak dimana ni?

J: Berhampiran dengan padang bola.

S: Apa yang kamu nampak?

J: Satu kawasan semak, ditumbuhi pokok tuan.

S: Apa berlaku disitu?

J: Sampai disana, kedua-dua suspek ni beritahu kepada saya bahawa 'itu parang' sambil ditunjukkan kepada saya kearah semak dibawah pokok tersebut.

S: Pokok apa?

J: Pokok apa tidak tahu.

S: Selepas itu apa yang kamu lakukan?

J: Selepas itu, saya bersama dengan pasukan saya dan Inspektor Sathya sekali membuat pencarian dikawasan semak tersebut dan telah menjumpai dua bilah parang.

[65] During cross-examination by the defence counsel, SP16 gave evidence relating to the location where the weapon 'parang' was found. At p 185 *RR Jld* 2(1), the evidence is as follows:

S: Berapakah, berapa jauh semak tersebut dari tempat kejadian?

J: Lebih kurang 150 ke 200-meter Puan, kalau tak silap saya.

S: 200-meter?

J: Ya.

S: Berapa jauh tempat tersebut dari flat di mana OKT ditahan?

J: Lebih kurang 200-meter, Puan.

S: 200-meter juga Inspektor saya nyatakan pada Inspektor yang parang tersebut telah pun dijumpai oleh Inspektor Sathya sebelum OKT dibawa ke semak tersebut, setuju atau tidak.

J: Tidak setuju, Puan

S: Saya cadangkan kepada Inspektor yang pakaian OKT juga telah dijumpai semasa tangkapan dibuat.

J: Tidak setuju, Puan.

At p 195, *RR Jld* 2(1):

S: Inspektor, melihat pada laporan yang dibuat oleh Inspektor sendiri siapa yang orang yang menanda report di sini.

J: Yang menaip report? Menerima report?

S: Ea, ea

J: Sarjan Fadzir Mohd Fadzir B Roslan

S: Ketika report ini dibuat inspektor, Inspektor sendiri yang taip sendiri laporan ini ataupun Inspektor sebut kepada penerima report

J: Penerima report yang taip sendiri

S: So Inspektor sebut dan

J: Ye

Further at p 197, *RR Jld* 2(1):

S: Melihat pada gambar P16 gambar yang ke 16 dan ke 17 di sini, Inspektor siapa yang sebenarnya yang telah keluarkan senjata itu.

J: Saya sendiri yang keluarkan.

S: Inspektor yang sendiri keluarkan.

J: So, yang 16 itu adalah gambar yang asalnya so bila keluarkan gambar 17.

S: Ok maksudnya gambar yang ke 17 adalah gambar selepas dikeluarkan.

J: Betul.

S: Inspektor sendiri yang keluarkan?

J: Betul.

S: Saya rujuk pada, pada P16 gambar yang ke 16 setuju kalau saya katakan kedua-dua senjata ni kedua-dua parang ni sini tidak disimpan ataupun disorok, melihat pada gambar di sini.

J: Tidak setuju.

S: Boleh nampak dengan jelas. A

J: Tidak setuju

[66] SP15 evidence in court during cross-examination by defence counsel is at p 110 *RR Jld* 2(1) as follows: B

S: Setuju dengan saya, berdasarkan keterangan inspektor sendiri, Suaib atau Buhari tidak masuk ke semak tersebut?

J: Setuju.

S: Inspektor ya, siapa yang masuk ke dalam semak tersebut? C

Inspektor ke?

J: Bukan saya.

S: Siapa yang masuk ke semak tersebut?

J: Satu pegawai. D

S: Satu pegawai ke lebih dari satu pegawai?

J: Di tempat tersebut ada 2 pegawai [tidak jelas].

S: Yang masuk ke dalam semak tersebut?

J: [Jawapan saksi tidak jelas gangguan mikrofon]. E

S: Dimana inspektor berada ketika gambar 14 dan 15 diambil?

J: Jauh dari kawasan.

[67] The HCJ in his grounds has stated as follows: F

[86] I have however only taken into account the above wordings 'saya boleh tunjukkan di mana saya simpan pakaian dan senjata' or 'I can show you where I kept the clothing's and weapons' for the purposes of s 27 of the Evidence Act 1950 ('the EA') and not the words 'yang saya gunakan pada hari kejadian' or 'I used during the incident' because I find that the additional words do not distinctly relate to the discovery of the items recovered under s 27 of the EA. G

[87] See *Pulukuri Kottaya vs King-Emperor* AIR 1947 PC 67 where Sir John Beaumont said at p 70:

> In their Lordship's view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. *Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the* H I

discovery of the knife in the house of the informant. (Emphasis added.)

[88] The issue for consideration is whether such information which led to the discovery of the weapons and clothing are admissible. Section 27 of the Evidence Act 1950 reads as follows:

> Section 27 How much of information received from accused may be proved.
>
> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[89] According to Augustine Paul in his seminal work, *Evidence Practice and Procedure* (4th Ed) 2010 at p 311, the following ingredients of s 27 of the Evidence Act 1950 needs to be fulfilled before it can be invoked:

(a) the information must have been received from a person accused of an offence;

(b) such person must have been in the custody of a police officer at the time of giving the information; and

(c) a fact must be deposed to as having been discovered in consequence of such information.

[90] Both the first and second accused have been charged with s 302 of the Penal Code. This means that the first requirement has been fulfilled. According to SP15 and SP16 both accused were arrested and in the police custody when they were subjected to interrogation that resulted in them giving the information. The second requirement was also thus fulfilled. As a result of the information given, some clothing's and weapons were discovered and so the third requirement was fulfilled.

[91] In *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630, it was held:

> In the light of the authorities referred to, *we hold that information admissible under s 27 of the Evidence Act includes accused's statement, or his act or conduct such as pointing out which leads distinctly to the discovery of a fact*. For such information to be admissible in evidence, there is no duty on the prosecution to prove the voluntariness of the information. Hence it is not necessary to conduct a trial within a trial to determine the voluntariness of the information ... (Emphasis added.)

[92] Therefore, the information given by the first and second accused as well as their conduct in leading the police to the house where the clothing's were discovered as well as the act of leading the police to the football field and gesturing with their face and hands to the place where the weapons were concealed amounted to information leading distinctly to discovery of a fact, namely, the clothing's and the weapons within the meaning of s 27 of the EA.

Police reports (P37) and (P44) were concoctions.

[93] Learned counsel for the first accused submitted that in respect of the statements made under s 27 of the EA, the police reports lodged by PW15 (P37) and by PW16 (P44) cannot be accepted as corroborative evidence of the statements made leading to discovery.

[94] The reason given was that the police reports (P37) and (P44) respectively were concocted by SP15 and PW16 because a perusal of these reports will reveal that although they were made separately by two different police officers at different times, the wordings in these reports, aside from the time, name of the police officers and the name of the accused, were identical.

[95] It was also submitted that these reports were not made as soon as the alleged statements were made but after the alleged weapons were found and for this reason, it was submitted that exhibit P37 and P44 were therefore concocted and should not be adduced as corroborative evidence of the oral testimony of PW15 and PW16 under s 27 of the EA.

[96] The Federal Court in *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367 held that the information received under s 27 of the EA needs to be proved by way of oral evidence and any contemporaneous written record of it only amounts to corroboration.

[97] The case of *Amathevelli* referred to the case of *Public Prosecutor v Hashim bin Hanafi* [2002] 4 MLJ 146 which held that information under s 27 is not required by law to be in writing and the absence of it cannot render the oral evidence given in court to be inadmissible. Augustine Paul J (as he then was) said:

> *Information given under s 27 is not a matter that is required by law to be in writing so as to be governed by ss 91 and 92 of the Act. Therefore, the information must be proved by oral* evidence *pursuant to s 60(b) of the Act. Thus, a written record of the information given by the accused will not by itself be substantive* evidence *of its contents and it is what the witness deposes in court as having been said by the accused that will be evidence* (see *Bhagirath*). *Where the information is contained in a police diary it can only be used for the purpose of refreshing memory* (see *Public Prosecutor v Er Ah Kiat* [1966] 1 MLJ 9). *Where it is contained in any other document it can, at the highest, serve only as* evidence *of corroboration. It is on this basis that a report prepared by a chemist pertaining to his analysis of drugs cannot be tendered as substantive* evidence *of its contents but only as corroboration of his oral evidence in court under s 157 of the Act* (see *Saw Thean Teik v R* [1953] MLJ 124; *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible (see *DPP v Hester* [1972] 3 All ER 1056). Its role is to confirm other evidence in the sense that it renders that other evidence more probable (see *Doney v R* (1990) 171 CLR 207; *DPP v Kilbourne* [1973] AC 729). It cannot therefore amount to that other evidence itself. *Thus, the record of an information will only enhance the credibility of the witness and the absence of it cannot render the oral evidence of it inadmissible; nor can it be a substitute for the evidence that it is meant to corroborate*. (Emphasis added.)

A [98] Exhibits P37 and P44 are therefore of mere corroborative value and it is the oral testimonies of PW15 and PW16 in court that constitutes the substantive evidence under s 27 of the EA.

[99] After a consideration of the testimonies of PW15 and PW16 in court, I find that their evidence is credible and their oral testimony of the information supplied B by both accused leading to the discovery of the clothing's and weapons were admissible under s 27 of the EA.

[68] The HCJ further explained in his grounds as follows:

C [117] With regard to the fact that the photographs P16(14) and P(15) respectively, which showed the accused allegedly pointing at a bush cannot corroborate the testimony of PW15 and PW16 that it was the accused's conduct that led to the discovery of the weapons, as I stated earlier, it is the oral testimony of PW15 and PW16 that constitutes the information leading to discovery under s 27 of the EA and not the police reports lodged subsequently. D

[118] In the same vein, the fact that the photographs allegedly showed the accused persons pointing out the location of the weapons and that the whole scene was staged, is of no consequence in so far as the admissibility of the information is concerned.

E [119] With regard to the fact that it was PW16 who brought the accused to the bushes and not the other way around, from the circumstances of the case, I find that the evidence given by PW16 was credible and I accept his evidence that the accused had given the information.

[120] With regard to the argument that based on the photographs P16(17), the F weapons were not concealed, even if true, again does not necessarily affect the admissibility of the information given as the mere fact that weapons are not concealed does not mean the information cannot be admitted.

[121] The weapons were discovered in a field. The field is a football field and it spans a wide and considerable area. Unless someone knows exactly where the weapons G were disposed of so that they knew where to look for it, the fact that they were located in an open field made no difference.

[122] The admissibility of information under s 27 of the EA does not depend upon whether the items were disposed in a concealed or an open location. What matters is that these items would not have been discovered if not for the information H supplied by the accused persons to PW15 and PW16.

Effect of the information supplied leading to discovery under s 27 of the EA

[123] The effect of the admissibility of the evidence of the information given by both the first and second accused leading to the discovery of the clothing's and weapons respectively is that a reasonable inference can be made that it was them that I inflicted the injuries to the deceased that led to his death.

[69] We agree with the finding of the HJC regarding the police reports P37 and P44 are mere corroborative value and it is the oral testimonies of PW15 and PW16 in court that constitutes the substantive evidence under s 27 of the

EA. In fact, the HCJ made a finding that the testimonies of PW15 and PW16 in court, their evidence are credible and their oral testimony of the information supplied by the appellants leading to the discovery of the clothing's and weapons were admissible under s 27 of the EA. At this juncture we are minded that this view of the trial judge as to the credibility of a witnesses must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding (*Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209).

[70] Thompson CJ's comments in *Chang Kim Siong v Public Prosecutor* were in the following term:

> *where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strands of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is; is that rope strong enough to hang the prisoner*?

[71] Considering SP9's evidence read together with the appellants' arrest within few hours after the deceased's body was found; the appellants were hiding behind the water tank in the toilet of the said house; there was scuffle before the arrest was affected; evidence given under s 27 of the EA led to the discovery of clothes and weapons and the evidence of SP14 which confirmed that there were more than ten slash wounds to the deceased including to the head of the deceased; The deceased's cause of death is slash wound to the head, the HCJ cannot in our view be said to have arrived into a wrong conclusion. The HCJ held correctly that:

> [129] The evidence as gathered from a combination of the circumstances was thus inconsistent with any other hypothesis than that of the guilt of the accused persons. There was therefore sufficient circumstantial evidence to connect the first and second accused to the death of the deceased.

[72] The HCJ has made a finding that the appellants committed the murder of the deceased. Though there was no eye-witness who saw the murder and the evidence is circumstantial in nature, we are satisfied that the evidence tendered in court provided sufficient connection to the appellants with the murder.

[73] The HCJ found SP9's evidence is credible and SP15 and SP16 are credible witnesses. The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness (*Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84). An appellate court should be slow to interfere

with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility (*Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79).

[74] In the instant case the HCJ very carefully analysed all the available evidence before him and made specific findings of fact founded upon that which he believed to be the truth. He also drew certain inferences from facts specifically found. In this respect we may form our independent view but we should only do so where the fact upon which the inference was drawn was either unwarranted or manifestly against the weight of evidence. That was not the case here.

CONCLUSION

[75] We find there is no appealable error in the decision by the HCJ. The appeal has no merit. We are satisfied that the conviction against the appellants is safe. It is our unanimous decision that the appeal is dismissed and the conviction and sentence meted against the appellants is affirmed.

Appeals dismissed.

Reported by Nuzul Fitrie